No. 557

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

IDA C. HAZZARD, ET AL.,

Petitioners,

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,

Respondent.

PETITIONERS' REPLY BRIEF

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CHASE NATIONAL is an adjudicated tort-feasor, "guilty of, at least, negligence". After deliberately breaching its trust by voluntarily assuming a position antagonistic to its *cestuis*, it "permitted" a surrender of the trust *res*, which gravely damaged the beneficiaries. Such misconduct was strongly condemned below. Respondent's brief significantly omits mention of any of the foregoing findings and conclusions.

Both in spirit and in content, respondent's brief sharply poses the following problems in elementary honesty: May big scale wrong be perpetrated by a large institution with impunity, while lesser institutions or individuals are prohibited from acts similar in kind but smaller in degree? Did the framers of the Constitution of the United States and the Congress which enacted the National Banking Act intend that the Federal power and prestige of National Banks in fiduciary capacities should constitute a predatory sword in the hands of the interests wielding them, without both Constitution and Statute providing a Federal shield and protection to the investing public?

Respondent's lack of candor, which occasioned pointed judicial rebuke below, persists in its brief to this Court. Not once does that brief refer to the lengthy opinion of the

Trial Court (159 N. Y. Misc. 57; R. 3635-3678). Neither that opinion, nor the findings or conclusions, once state that this National Bank trustee was a fiduciary. That opinion employs the word "fiduciary" only to negate the idea of a status other than that of a "stakeholder". Only in denying the motion for re-argument, etc. did the New York Court of Appeals state "that the liability of the corporate trustee though acting as a fiduciary was limited by the terms of the trust agreement" (R. 3705). Respondent's assertions (Br. 14-15) that the Trial Court, the Appellate Division, and the Court of Appeals (prior to the motion for reargument, etc.) all held this National Bank "a fiduciary" is simply contrary to fact.

Respondent's colorable vehemence in treating our statements of fact studiously avoids reference to, and leaves totally unchallenged findings that this National Bank trustee:

a. deliberately assumed a position, after accepting the trust, definitely adverse to that of its *cestuis;*

b. elected to "permit" removal of the trust *res* pursuant to a concealed substitution clause, of which the *cestuis* were unaware;

c. represented to its *cestuis* the assumption of fiduciary duties, but secretly sought to evade them;

d. actively participated in the management and control of NEP, the obligor (and its personal debtor);

e. damaged the *cestuis* in "permitting" a substitution whereby at least NEP defrauded them;

f. "permitted" the substitution in asserted reliance upon an earnings certificate which it, itself, had previously, in writing, termed spurious;

g. deliberately refrained from exercising powers of examination expressly provided by the trust instrument, before "permitting" substitution, and surrendering the trust *res;*

h. failed to consult the *cestuis* before "permitting" substitution, and concealed the fact of substitution and of its own adverse interest.

The heat of respondent's references to collateral questions, leaves wholly undisputed the foregoing foundations for the invocation of controlling Federal law and policy. Respondent's complete avoidance of all mention of its breaches of trust, is almost surprising. However, since respondent has seen fit to put our veracity in issue, we add:

1. It is perfectly true, as respondent so frequently reiterates that the Trial Court "found" that this National Bank was not "actuated in any way by bad faith." We expressly (Pet. 24), directed the attention of this Court to the Findings (R. 117) so aggressively asserted by respondent, stating: "The Trial Court * * * held that it did not contrive or permit this substitution for those reasons (R. 117)." Findings such as 263, 264, 265 (R. 117) and 312 (R. 126) are legal conclusions rather than findings of fact. We recognize patent inconsistencies between such general conclusions and the specific findings of particular facts hereinafter enumerated. Our exception in point of law to these factually unsupported conclusions and the Trial Court's written reasons for reaching them, constitute one of the causes why we seek relief in this Court.

The simple fact remains that *every single line* of the petition, where quotation marks appear, is taken from the findings or opinion of the Trial Court, except as *specifically* noted. Nowhere does the petition state that the Judge, in express words, brought himself to say that CHASE NATIONAL profited by "permitting" the substitution. Instead, we specifically enumerated finding after finding where the Trial Court showed benefits accruing to CHASE NATIONAL after the substitution, which it would not have received, but for the substitution. Brevity bars setting these findings forth *in extenso*, but we respectfully request the Court's particular attention to the following findings in Volume 1 of the record:

151, 152, 153, 154, 155, 156, 157 (R. 86); 158, 159, 160 (R. 87); 165, 169 (R. 88); 135, 136, 137 (R. 82); 137A, 138, 139, 140, 141 (R. 83); 142, 143, 144 (R. 84).

Our petition showed the plans known to CHASE NATIONAL whereby NPS proposed to use the securities when released by our trustee from the lien protecting its *cestuis* (16-17, 21). We likewise showed how the simple honesty of the indenture trustee for Municipal Service bondholders, spoiled these plans (Pet. 22-23). The *subsequent* pledge of this released collateral with the co-defendant banks, in no wise altered the damage already done. One isolated finding that CHASE NATIONAL made no profit from the subsequent *pledge* to these other banks of the released collateral, is astutely confused by respondent with assertions that the Court thus found it had derived no profit from the *earlier substitution*, itself. The conclusion contained in Finding 312 related solely to the issue before the Trial Court with respect to the alleged conspiracy among the three banks. The language of 312 appears nowhere among the printed findings proposed by CHASE NATIONAL (R. 223-278); but is taken from the unprinted findings (cf. Note R. 278) "since no appeal has been taken with respect to the defendants the New York Trust Company and Manufacturers Trust Company". The substitution occurred December 21. The Penn Central Stock was pledged with New York Trust Company on December 30 and the Michigan stock with the same bank on December 26 (R. 125). This is far different from respondent's oft-repeated, bald assertion of: "The Trial Court's findings that respondent * * * did not profit (Finding 312; R. 126) * * * by the *substitution*" (Br. 12). In similar fashion, respondent quoted a portion of Finding 312 reading "did not profit directly or indirectly" (Br. 11, 14), without on those occasions adding the highly significant language of the remainder of the same sentence in the same finding "from the *pledge* of the collateral released from under the trust indenture with defendants New York Trust Company and Manufacturers Trust Company."

2. Respondent similarly relies (Br. 5-6) on findings 239 (R. 111) and 264 (R. 117) that the earnings certificate presented to it at the time of the substitution "correctly reflected the figures appearing on the books and records of NPS" and that "CHASE NATIONAL acted in good faith in relying upon the application papers". The simple fact is that CHASE NATIONAL *knew* that the "figures", "books" and "records" of NPS were false, and had so stated repeatedly in writing (Findings 177, et seq., R. 91-96).[1]

3. Respondent seeks refuge in the circumstance that Equitable Trust Company executed the original trust indenture (Br. 2, 4, 22). Equitable Trust Company had no position adverse to the bondholders. It had no officer on the board of the obligor. It had no loans to the obligor. It had no loans to the officers of the obligor. It had no loans to the parent company, the ultimate stockholder of the obligor. It was nearly 19 months *before* the substitution that CHASE NATIONAL became our substituted trustee by consolidation with Equitable Trust Company (R. 46).[2] It was after the consolidation with Equitable Trust that CHASE NATIONAL voluntarily loaned money to NEP (R. 67), with the endorsement of NPS (R. 69), to the Corporation Securities Company (R. 74-75), etc. The reissued original prospectus in the file of CHASE NATIONAL on the date of the substitution, represented that CHASE NATIONAL, not Equitable, was our trustee, and still failed to disclose the possibility of substitution (R. 122; Exh. 189, R. 3215-3218).

4. CHASE NATIONAL asserts that the indenture "entitled NEP" and *"required* the trustee" to make the substitution (Br. 3). This is simply contrary to fact. *Substitution was not mandatory* (cf. Pet. 18; R. 57-58).

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[1]Were we to adopt respondent's negative technique of quoting refusals to find, we would call attention to the highly significant modifications made in the defendant's proposed finding 129 (R. 266).

[2]The Court expressly found:

"43. By accepting the designation as 'Trustee' the CHASE NATIONAL represented to plaintiffs that it would exercise its experience, power and financial acumen to protect the interests of debenture holders" (R. 62).

5. The statement (Br. 13) that CHASE NATIONAL's loan to NEP was "amply margined" utterly ignores the legally invalid title shown by Findings 154-159 (R. 86-87), and that National Bank's efforts subsequently to switch other undersecured "Insull Group" loans to the greater safety of that revivified collateral (Findings 124-146) (R. 80-84).

Respondent's desperation is indicated by its use of the refusal to make certain findings (cf. Refusal 109, Br. 13), while failing to call this Court's attention to the alternative Finding 195 actually made (R. 98).

* * * *

Respondent flatly asserts (Br. 9) that we have conceded that the Federal questions were "raised for the first time on the motion to reargue", when, it alleges, we urged "some *undesignated* controlling Federal law", etc. The inaccuracy of such assertions will be evident from a reading of the supplement to the record (R. 3707-3723; 3699-3705; 3694-3698, 3705). There we expressly stated, in replying to an identical argument (R. 3700): "We do not concede that these Federal questions have not been present throughout this litigation; but maintain that no earlier occasion existed, for specifically arguing their effect" (R. 3695-3696). To preclude the possibility of respondent seeking the very pretext it now asserts, we then further explicitly pointed out to the Court of Appeals: "In the interest of justice, we respectfully pray that this Court, whether or not it feels that a Federal question was previously raised, or arose from an unanticipated ruling of the Court, nevertheless now entertain and decide the question presented" (R. 3697). Instead of offering the Court of Appeals "undesignated controlling Federal law", we specifically urged the self-same proposition, the self-same constitutional and statutory grounds, almost identically the self-same Federal decisions. Thus, when the Court of Appeals wrote that petitioners' papers on reargument did "not present either

authority or reason for changing our decision", the said Court necessarily entertained and decided the self-same Federal and constitutional questions we raise in this Court. The New York Court of Appeals thus held that the statutes of the United States, the Constitution of the United States, and the decisions of the United States Supreme Court, then, as now, urged by us, presented neither "authority or reason" for changing its decision that a National Bank fiduciary may successfully exculpate itself by contract from *all* fiduciary duties. We completely reject respondent's characterization of the papers before the Court of Appeals. We are confident that a reading of those papers set forth in the supplement to the record will furnish this Court with full and complete answers.

The jurisdiction of this Court is clear (Pet. 3-8). It is also clear that respondent has not answered the reasons for granting the writ set forth in the petition (34-38).

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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